

Appendix 1. Regional Brownfields Coordinators

<i>REGION & STATES</i>		<i>ADDRESS, PHONE NUMBER, FAX, E-MAIL</i>
EPA Region 1 Carol Tucker	CT, ME, MA, NH, RI, VT	One Congress Street Boston, MA 02114-2023 Phone (617) 918-1210 Fax (617) 918-1221 tucker.carol@epa.gov
EPA Region 2 Larry D’Andrea	NJ, NY, PR, VI	290 Broadway 18th Floor New York, NY 10007 Phone (212) 637-4314 Fax (212) 637-4360 dandrea.larry@epa.gov
EPA Region 3 Tom Stolle	DE, DC, MD, PA, VA, WV	1650 Arch Street Philadelphia, PA 19103 Phone (215) 814-3129 Fax (215) 814-5518 stolle.tom@epa.gov
EPA Region 4 Wanda Jennings	AL, FL, GA, KY, MS, NC, SC, TN	Atlanta Federal Center 61 Forsyth Street Atlanta, GA 30303 Phone (404) 562-8682 Fax (404) 562-8628 jennings.wanda@epa.gov
EPA Region 5 Deborah Orr	IL, IN, MI, MN, OH, WI	77 West Jackson Boulevard Chicago, IL 60604-3507 Phone (312) 886-7576 Fax (312) 886-7190 orr.deborah@epa.gov
EPA Region 6 Jonathan Weisberg	AR, LA, NM, OK, TX	1445 Ross Avenue, Suite 1200 (6SF-PB) Dallas, TX 75202-2733 Phone (214) 665-2180 Fax (214) 665-6660 weisberg.jonathan@epa.gov
EPA Region 7 Susan Klein	IA, KS, MO, NE	901 N. 5th Street Kansas City, MO 66101 Phone (913) 551-7786 Fax (913) 551-8688 klein.susan@epa.gov
EPA Region 8 Kathie Atencio	CO, MT, ND, SD, UT, WY	999 18th Street, Suite 300 (EPR-B) Denver, CO 80202-2406 Phone (303) 312-6803 Fax (303) 312-6955 atencio.kathie@epa.gov

EPA Region 9 Jim Hanson	AZ, CA, HI, NV, AS, GU	75 Hawthorne Street, SFD 1-1 San Francisco, CA 94105 Phone (415) 972-3188 Fax (415) 947-3528 hanson.jim@epa.gov
EPA Region 10 Tim Brincefield	AK, ID, OR, WA	1200 Sixth Avenue (ECL-112) Seattle, WA 98101 Phone (206) 553-2100 Fax (206) 553-0124 brincefield.timothy@epa.gov

Appendix 2. Prohibitions on Use of Funds

Grant funds may not be used for the payment of:

- A penalty or fine.
- A federal cost-share requirement (for example, a cost share required by other federal funds).
- An administrative cost (see below).
- A response cost at a brownfield site for which the recipient of the grant or loan is potentially liable under CERCLA §107.
- A cost of compliance with any federal law, excluding the cost of compliance with laws applicable to the cleanup.
- Unallowable costs (e.g., lobbying and fund raising) under OMB Circulars A-21, A-87, or A-122, as applicable.

Administrative Cost Prohibition

The Brownfields Law prohibits the use of any “part of a grant or loan” for the payment of an administrative cost. In implementing this prohibition, EPA has made a distinction between prohibited administrative costs and eligible programmatic costs.

- A. Administrative Costs. Prohibited administrative costs are direct costs, including those in the form of salaries, benefits, contractual costs, supplies, and data processing charges, incurred to comply with most provisions of the *Uniform Administrative Requirements for Grants* contained in 40 CFR Part 30 or 40 CFR Part 31. Direct costs for grant administration are ineligible even if the grantee or subgrantee is required to carry out the activity under the grant agreement. **Prohibited administrative costs also are all indirect costs under OMB Circulars A-21, A-87, and A-122, and Subpart 31.2 of the *Federal Acquisition Regulation*.**
- B. Statutory Exclusions. The administrative cost prohibition does not apply to direct costs for:
1. Investigation and identification of the extent of contamination;
 2. Design and performance of a response action; or
 3. Monitoring of a natural resource.
- C. Programmatic Costs. EPA has determined that the administrative cost prohibition does not apply to “programmatic” costs, i.e., costs for activities that are integral to achieving the purpose of the grant, even if EPA considered the costs to be “administrative” under the prior brownfields program. For example, the prohibition does not apply, under a

revolving loan fund grant, to costs incurred in making loans (such as the costs of loan processing, legal fees, and professional services) or overseeing the borrower's activities to ensure compliance with relevant and appropriate requirements of the *National Contingency Plan* (see 40 CFR §300.700 *et seq.*). These costs are programmatic, not administrative. Direct costs, as defined in the applicable OMB Cost Principle Circular, for the following programmatic activities are not subject to the administrative cost prohibition:

1. In the case of grants for site characterization and assessment, expenses for inventorying, characterizing, assessing, and conducting planning related to brownfield sites.
2. In the case of grants for capitalization of revolving loan funds:
 - (a) expenses for making and managing loans;
 - (b) expenses, including financial management expenses, for operating the revolving fund; and
 - (c) expenses for making and managing subgrants under CERCLA §104(k)(3)(B)(ii).
3. In the case of grants for direct use by eligible entities and nonprofit organizations in remediation of brownfield sites under CERCLA §104(k)(3)(A)(ii), expenses for site remediation activities.
4. In the case of grants for implementation of brownfields programs under CERCLA §104(k)(6), expenses for providing training, research, and technical assistance.
5. Costs incurred for complying with procurement provisions of 40 CFR Part 30 and 31 are considered eligible programmatic costs only if the procurement contract is for services or products that are direct costs for performing activities specified above in Section B, "Statutory Exclusions," or Section C, "Programmatic Costs."
6. Costs for performance and financial reporting required under 40 CFR 30.51 and 30.52, and 40 CFR 31.40 and 31.41 are eligible programmatic costs. Performance and financial reporting are essential programmatic tools for both the recipient and EPA to ensure that grants are carried out in accordance with statutory and regulatory requirements.

Eligible programmatic costs can include expenses for travel, training, equipment, supplies, reference materials, and contractual support if those costs are reasonable and allocable to tasks specified in a grantee's approved scope of work for carrying out the activities described in Section B, "Statutory Exclusions," or Section C, "Programmatic Costs."

Eligible programmatic costs may be used to help meet the RLF capitalization grant and direct cleanup grant recipients' 20 percent cost share. Prohibited administrative costs may not be used to meet recipients' cost share.

For further information on these prohibitions, contact your Regional Brownfields Coordinator listed in *Appendix 1*.

Appendix 3. Guidance on Sites Eligible for Brownfields Funding Under CERCLA §104(k)

<u>Contents</u>	<u>Page</u>
3.1 Introduction	2
3.2 General Definition of Brownfield Site	2
3.3 Additional Areas Specifically Eligible for Funding	2
3.3.1 Contamination by Controlled Substance	3
3.3.2 Contamination by Petroleum or Petroleum Product	3
3.3.3 Mine-scarred Lands	5
3.4 Particular Classes of Sites Not Eligible for Funding or Eligible Only Under Property-specific Determinations	6
3.4.1 Facilities Subject to CERCLA Removal Actions	9
3.4.2 Facilities Subject to Unilateral Administrative Orders, Court Orders, Administrative Orders on Consent, or Judicial Consent Decrees Issued to or Entered into by Parties Under CERCLA	10
3.4.3 Facilities Listed (or Proposed for Listing) on the National Priorities List	10
3.4.4 Facilities to which a permit has been issued by the United States or an authorized state under the Solid Waste Disposal Act (RCRA), the Federal Water Pollution Control Act, the Toxic Substances Control Act, or the Safe Drinking Water Act	10
3.4.5 RCRA Sites	11
3.4.6 Land disposal units that have filed a closure notification under Subtitle C of RCRA and to which closure requirements have been specified in a closure plan or permit.	12
3.4.7 Facilities that are subject to the jurisdiction, custody, or control of the United States government.	13
3.4.8 Sites Contaminated with PCBs	13
3.4.9 Exclusion of LUST Trust Fund Sites	14

3.1 Introduction

The information provided in this appendix should be used by applicants as a guide in determining the eligibility of any property for brownfields funding. The following guidance provides EPA's preliminary views on the types of sites that may be appropriate for funding. EPA is providing this information as guidance to applicants to assist you in developing your proposals for funding under CERCLA §104(k). This guidance provides preliminary interpretations and policy guidance that EPA intends to use as a guide when we exercise our authority to award funds under §104(k). However, we believe that further development may impact our view of these provisions, and we will reevaluate our preliminary views in light of the factual information we receive with each proposal, as well as over the course of implementing the §104(k) grant program.

This guidance does not impose legally-binding requirements. Applicants are free to raise questions about the appropriateness of these preliminary views, and EPA will consider whether these preliminary views are appropriate at that time. Any decision by EPA to apply this preliminary guidance will be made based on the applicable statutory provisions.

3.2 General Definition of Brownfield Site

The new Brownfields Law defines a "Brownfield Site" to mean:

"...real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."

Brownfield sites include all "real property," including residential, as well as commercial and industrial properties.

3.3 Additional Areas Specifically Eligible for Funding

The Brownfields Law identifies three types of properties that are specifically eligible for funding:

1. Sites contaminated by *controlled substances*.
2. Sites contaminated by *petroleum or a petroleum product*.
3. *Mine-scarred lands*.

See below for guidance on determining the scope of each of these three types of sites. Applicants should identify properties included within their funding proposals that fall within the scope of any of the following three areas.

3.3.1 Contamination by Controlled Substance

Sites eligible for funding include real property, including residential property, that is contaminated by a controlled substance. A “controlled substance” is defined under the Controlled Substances Act as “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this title (21 USC Section 812). The term does not include distilled spirits, wine, malt beverages, or tobacco...”

For example, sites eligible for brownfields funding may include private residences, formerly used for the manufacture and/or distribution of methamphetamines or other illegal drugs where there is a presence or potential presence of controlled substances or pollutants, contaminants, or hazardous substances (*e.g.*, red phosphorous, kerosene, acids).

3.3.2 Contamination by Petroleum or Petroleum Product

Petroleum-contaminated sites (except those sites receiving LUST trust fund monies) may be eligible for brownfields funding if the applicant can provide information that will enable EPA or the state to make certain statutory determinations, as described in *Appendix 4*¹. (EPA will make the statutory determinations for tribes). Petroleum-contaminated sites (or portions of properties contaminated with petroleum or petroleum product) that are eligible for brownfields funding include certain sites that are not underground storage tank (UST) sites as described below. Petroleum is defined under CERCLA as “crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under that section.”

For a petroleum contaminated site(s) that otherwise meets the definition of a brownfields site to be eligible for funding, EPA or the state must determine:

1. the site is of “relatively low risk” compared with other “petroleum-only” sites in the state; and
2. there is no viable responsible party; and
3. the site will not be assessed, investigated or cleaned up by a person that is potentially liable for cleaning up the site.

In addition, petroleum-contaminated sites must not be subject to a corrective action order under the Resource Conservation and Recovery Act (RCRA) §9003(h).

In the case of proposals that include requests for an assessment or direct cleanup grant to address petroleum-contaminated sites, applicants must provide information in their proposal indicating whether the site meets each of the criteria listed above. If EPA awards an applicant a revolving

¹ Appendix 4: Guidance for Requests for Property-Specific Determinations for Funding

loan fund grant, the state or EPA must make the same determinations for site(s) that will be cleaned up under a loan or subgrant. These criteria are explained below.

Note: A determination by the EPA or a state under CERCLA section 101(39)(D) for the purpose of brownfields funding does not release any party from obligations under any federal or state law or regulation, or under common law, and does not impact or limit EPA or state enforcement authorities against any party.

“Relatively Low Risk”:

Applicants whose brownfield site(s) include properties or portions of properties contaminated with petroleum or petroleum products must provide information in their proposal indicating that the property represents a relatively low risk (compared to other petroleum-only sites). Our preliminary view is that the following types of petroleum-contaminated sites are high risk sites, or are not of “relatively low risk.”

1. “High risk” sites currently being cleaned up using LUST trust fund monies.
- b. Any petroleum-contaminated site that currently is subject to a response under the Oil Pollution Act (OPA).

Note: Any site that does not fall under any of the provisions listed above would be considered to be of relatively low risk for purposes of determining eligibility for a brownfields grant.

“A Site for Which There is No Viable Responsible Party”

EPA or the state is required to determine that there is no viable responsible party that can address the petroleum contamination at the site. If EPA, or the state, identifies a party that is responsible for the site, and that party is financially viable, then the site is not eligible for funding and EPA cannot award the grant. This analysis is twofold -- EPA or the state must first determine whether a responsible party exists and, if a responsible party is identified, then determine whether that party is viable. Applicants must provide information in their proposal to demonstrate that the property or portion of property contaminated with petroleum or petroleum product for which they seek funding has no viable responsible party.

A petroleum-contaminated site may be determined to have no responsible party if the site was last acquired (regardless of whether the site is owned by the applicant) through tax foreclosure, abandonment, or equivalent government proceedings, and that site meets the criteria in (1) below. Any petroleum-contaminated site not acquired by a method listed above may be determined to have no responsible party if the site meets the criteria in both (1) and (2) below.

(1) No responsible party has been identified for the site through:

(a) a judgment rendered in a court of law or an administrative order that would require any party to assess, investigate, or clean up the site,

(b) an enforcement action by federal or state authorities that would require any party to assess, investigate, or clean up the site, or

(c) a citizen suit, contribution action or other third party claim brought against the current or immediate past owner for the site that would, if successful, require the assessment, investigation, or clean up the site, and

(2) The current and immediate past owner did not dispose of, or own the subject property during the disposal of, any contamination at the site, did not exacerbate the contamination at the site, and took reasonable steps with regard to the contamination at the site.²

If no responsible party is identified above, then the petroleum-contaminated site may be eligible for funding. If a responsible party is identified above, EPA or the state must next determine whether that party is viable. If any such party is determined to be viable, then the petroleum-contaminated site may not be eligible for funding. A party will be considered viable if:

(3) the party is financially capable of satisfying obligations under federal or state law to assess, investigate or clean up the site. For example, a corporation that may be responsible for the cleanup of the site that is insolvent or defunct will generally not have the financial capacity to satisfy its obligations. Resources available to assist in determination of financial viability include Chapter 3 (Business Status and Financial Research) of the EPA PRP Search Manual at

<http://www.epa.gov/Compliance/resources/publications/cleanup/superfund/prpmanual/>

and the EPA economic models for analyzing financial ability to pay at

<http://www.epa.gov/compliance/civil/programs/econmodels/>.

“Cleaned Up by a Person Not Potentially Liable”:

Brownfields funding may be awarded for the assessment and cleanup of petroleum-contaminated sites provided:

² For purposes of determining petroleum brownfield grant eligibility “reasonable steps with regard to contamination at the site” includes, as appropriate: stopping continuing releases, preventing threatened future releases, and preventing or limiting human, environmental, or natural resource exposure to earlier petroleum or petroleum product releases. Reasonable steps are discussed in more detail on pages 9-12 of EPA’s March 6, 2003, “*Common Elements*” guidance.

- 1) the applicant has not dispensed petroleum or petroleum-product at the site, and
- 2) the applicant did not exacerbate the contamination at the site and took reasonable steps with regard to the contamination at the site.

“Is not subject to any order issued under §9003(h) of the Solid Waste Disposal Act”:

Proposals that include requests for an assessment or direct cleanup grant to address petroleum-contaminated sites must not be subject to a corrective action order under a Resource Conservation and Recovery Act (RCRA) §9003(h). If EPA awards an applicant a revolving loan fund grant, the State or EPA must make the same determination for site(s) that will be cleaned up under a loan or subgrant.

3.3.3 Mine-scarred Lands

Under the new Brownfields Law, mine-scarred lands are eligible for brownfields funding. Applicants for brownfields funding that include properties within their proposal that they believe fall within the following definition of mine-scarred lands are encouraged to provide in the site description section of their proposals information identifying and describing such properties.

EPA’s preliminary view is that “mine-scarred lands” are those lands, associated waters, and surrounding watersheds where extraction, beneficiation, or processing of ores and minerals (including coal) has occurred. For the purposes of this section, the definition of extraction, beneficiation, and processing is the definition found at 40 CFR 261.4(b)(7).

Mine-scarred lands include abandoned coal mines and lands scarred by strip mining.

Examples of coal mine-scarred lands may include, but are not limited to:

- abandoned surface coal mine areas,
- abandoned deep coal mines,
- abandoned coal processing areas,
- abandoned coal refuse areas,
- acid or alkaline mine drainage, and
- associated waters affected by abandoned coal mine (or acid mine) drainage or runoff, including stream beds and adjacent watersheds.

Examples of non-coal hard rock mine-scarred lands may include, but are not limited to:

- abandoned surface and deep mines,
- abandoned waste rock or spent ore piles,

- abandoned roads constructed wholly or partially of waste rock or spent ore,
- abandoned tailings, disposal ponds, or piles,
- abandoned ore concentration mills,
- abandoned smelters,
- abandoned cyanide heap leach piles,
- abandoned dams constructed wholly or partially of waste rock, tailings, or spent ore,
- abandoned dumps or dump areas used for the disposal of waste rock or spent ore,
- acid or alkaline rock drainage, and
- waters affected by abandoned metal mine drainage or runoff, including stream beds and adjacent watersheds.

3.4 Particular Classes of Sites Not Eligible for Funding or Eligible Only Under Property-specific Determinations

EPA excludes the following types of facilities from funding eligibility unless the applicant fulfills the requirements for demonstrating that the site meets the criteria for a property-specific determination for funding (see *Appendix 4 Guidance for Requests for Property-Specific Determinations for Funding*). Applicants are encouraged to indicate within the site description section of their proposal if any site or property included within the scope of their funding proposal falls within the scope of any of the categories of sites listed below. When requesting a property-specific determination for funding, applicants should follow the instructions provided in *Appendix 4* for indicating that brownfields funding at such sites will ensure protection of human health and the environment and promote economic development or the creation or preservation of greenspace or recreational areas. (Note: The following discusses limitations on funding particular classes of sites. Many of these limitations reflect policy decisions. Where the limitations are based on statutory provisions, we have noted that.)

Also, please note that in providing funding for brownfield sites, and given that a limited amount of funding is available for brownfields grants, EPA's goal is to not provide brownfields funding to sites where EPA has a planned or ongoing enforcement action. While EPA does not intend that the existence of a planned or ongoing enforcement action will necessarily disqualify a site from receipt of brownfields funding, EPA does believe it is necessary that EPA be aware of the existence of any such action in making funding decisions. As a result, EPA will conduct an investigation to evaluate whether a site is, or will be, subject to an enforcement action under CERCLA or other federal environmental statutes. EPA is requesting that applicants identify ongoing or anticipated environmental enforcement actions related to the brownfield site for which funding is sought.

The Brownfields Law also excludes three types of properties from funding eligibility and does not allow EPA the opportunity to provide funding for these properties after making a property-specific determination. These three types of properties include: 1) sites listed on the NPL, 2) facilities subject to unilateral administrative orders, court orders, administrative orders on

consent or judicial consent decrees issued to or entered into by parties under CERCLA, and 3) facilities that are subject to the jurisdiction, custody, or control of the United States government.

Sites Not Eligible for Funding Without a Property-Specific Determination

1. Facilities subject to planned or ongoing CERCLA removal actions.
2. Facilities that are subject to unilateral administrative orders, court orders, administrative orders on consent or judicial consent decrees or to which a permit has been issued by the United States or an authorized state under the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act (RCRA)), the Federal Water Pollution Control Act (FWPCA), the Toxic Substances Control Act (TSCA), or the Safe Drinking Water Act (SDWA).
3. Facilities subject to corrective action orders under RCRA (sections 3004(u) or 3008(h)) and to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures.
4. Facilities that are land disposal units that have filed a closure notification under subtitle C of RCRA and to which closure requirements have been specified in a closure plan or permit.
5. Facilities where there has been a release of polychlorinated biphenyls (PCBs) and are subject to remediation under TSCA.
6. Portions of facilities for which funding for remediation has been obtained from the Leaking Underground Storage Tank (LUST) Trust Fund.

Guidance regarding the scope of each of the funding restrictions listed above is provided below.

Sites Not Eligible for Brownfields Funding and Not Eligible for a Property-Specific Determination

1. Facilities listed (or proposed for listing) on the National Priorities List (NPL).
2. Facilities subject to unilateral administrative orders, court orders, administrative orders on consent, or judicial consent decrees issued to or entered into by parties under CERCLA.
3. Facilities that are subject to the jurisdiction, custody, or control of the United States government. (NOTE: Land held in trust by the United States government for an Indian tribe is eligible for brownfield funding.)

3.4.1 Facilities Subject to CERCLA Removal Actions

Properties (including parcels of properties) where there are removal actions may not receive funding, unless EPA makes a property-specific determination of funding eligibility.

EPA's preliminary view is that a removal may be identified by the occurrence of one of the following events, whichever occurs first in time: EPA issues an action memo; EPA issues an EE/CA approval memo; EPA mobilizes onsite; or EPA issues a notice of federal interest to one or more potentially responsible parties (PRP(s)), which in emergencies may be made verbally.

Our preliminary view is that, for the purposes of eligibility to receive brownfields funding, and for no other reason, a removal is complete when the actions specified in the action memorandum are met, or when the contractor has demobilized and left the site (as documented in the "pollution report" or POLREP). Once a removal action is complete, a property is eligible for brownfields funding without having to obtain a property-specific funding determination. Applicants applying for brownfields funding for sites at which removal actions are complete must include documentation of the action being complete with their funding proposal.

Parcels of facilities not affected by removal action at the same property may apply for brownfields funding and may be eligible for brownfields funding on a property-specific basis. Property-specific funding decisions will be made in coordination with the on-scene coordinator (OSC) to ensure that all removals and cleanup activities at the property are conducted in safe and protective manners and to ensure that the OSC retains the ability to address all risks and contamination.

Please note that if a federal brownfields-funded site assessment results in identifying the need for a new removal action, the grantee may continue to expend assessment grant funds on additional assessment activities. However, any additional expenditure of federal brownfield funds and any

additional site assessment activities should be conducted in coordination with the OSC for the site.

Any property or site where there are removal actions may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development, or the preservation of green space. EPA will consider providing funding to an eligible entity for assessment or cleanup activities at the site, on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided in *Appendix 4*).

3.4.2 Facilities Subject to Unilateral Administrative Orders, Court Orders, Administrative Orders on Consent, or Judicial Consent Decrees Issued to or Entered into by Parties Under CERCLA

Sites subject to administrative orders, court orders, and consent or judicial consent decrees issued or entered into by parties under the provisions of CERCLA are not eligible for funding, even on a property-specific basis. Therefore, applicants should not include such sites within the scope of their brownfields funding proposals.

3.4.3 Facilities Listed (or Proposed for Listing) on the National Priorities List

CERCLA sites listed on the NPL and sites proposed to be listed on the NPL are not eligible for brownfields funding. In addition, these sites are not eligible for funding on a property-specific basis. Therefore, applicants should not include proposed or listed NPL sites within the scope of brownfields funding proposals.

3.4.4 Facilities to which a permit has been issued by the United States or an authorized state under the Solid Waste Disposal Act (RCRA), the Federal Water Pollution Control Act, the Toxic Substances Control Act, or the Safe Drinking Water Act

Generally, in cases where a property or a portion of a property is permitted under the Resource Conservation and Recovery Act, Section §1321 of the Clean Water Act, the Safe Drinking Water Act, and/or the Toxic Substances and Control Act, the property, or portion of the property, may not receive funding, without a property-specific determination. Therefore, applicants should review the following guidance regarding which types of permitted facilities may not receive funding unless EPA makes a property-specific determination to provide funding. Applicants should note that the exclusion for permitted facilities does not extend to facilities with National Pollutant Discharge Elimination System (NPDES) permits issued under the authorities of the

Federal Water Pollution Control Act, but is limited to facilities issued permits under the authorities of the Oil Pollution Act (*i.e.*, §1321 of FWPCA).

In cases where one or more portions of a property are not eligible for funding, the applicant should identify the specific permit and situation that causes the property to be excluded. In addition, the applicant must include, within the proposal, documentation that federal brownfields funding for the assessment or clean up of the property will further the goals established for property-specific funding determinations (see attached guidance on property-specific funding determinations).

Any property or site that has been issued a permit under the federal environmental statutes listed above (and in accordance with any additional guidelines provided in *Appendix 4*) may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development or the preservation of greenspace. EPA will consider providing funding to an eligible entity for assessment or cleanup activities at the site, on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided in *Appendix 4*).

In some cases, a facility may not have a permit or order because they are not in compliance with federal or state environmental laws requiring that they obtain a permit or the facility has failed to notify EPA of their regulatory status. Such facilities are not eligible for brownfields funding. For example, a RCRA treatment unit operator is required to obtain a permit and/or notify EPA of its operation. An operator that fails to fulfill those obligations will likely not have a permit or order as EPA will be unaware of their existence. Therefore, it is EPA's preliminary view that such facilities are ineligible to receive brownfields funds as a result of their failure to comply with a basic regulatory requirement. Additional guidance on the eligibility of RCRA-permitted facilities, including facilities under administrative or court orders, including corrective action orders, is provided in *Appendix 4*.

3.4.5 RCRA Sites

Excluded RCRA Facilities

EPA's preliminary view is that the following types of RCRA facilities ***may not receive funding without a property-specific determination***:

- a. *RCRA-permitted facilities.*
- b. RCRA interim status facilities with administrative orders requiring the facility to conduct corrective action or otherwise address contamination, including facilities with orders issued under the authorities of RCRA §3008(a), §3008(h), §3013, and §7003.

- c. Facilities under court order or under an administrative order on consent or judicial consent decree under RCRA or CERCLA that require the facility to conduct corrective action or otherwise address contamination at the facility.
- d. Land disposal units that have notified EPA or an authorized state of their intent to close and have closure requirements specified in closure plans or permits.

However, if a grant or loan applicant is requesting a grant for property that is excluded, the applicant may still be eligible for a brownfields grant if the applicant can demonstrate that funding will ensure protection of human health and the environment and promote economic development or the preservation of greenspace. EPA will consider providing funding to an applicant for assessment or cleanup activities at such a site on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations in *Appendix 4*).

RCRA Facilities that are Eligible for Funding

EPA's preliminary view is that the following types of RCRA facilities would not fall within the scope of the exclusion and would be eligible for funding:

- a. RCRA interim status facilities that are not subject to any administrative or judicial order or consent decree;
- b. RCRA interim status facilities that are subject to administrative or judicial orders that do **not** include corrective action requirements or any other cleanup provisions (*e.g.*, RCRA §3008(a) orders without provisions requiring the owner/operator to address contamination); and
- c. Parcels of RCRA facilities that are not under the scope of a RCRA permit or administrative or judicial order.

In addition, any property or site that has been issued a permit under RCRA may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development or the preservation of green space. EPA will consider providing funding to an eligible entity for assessment or cleanup activities at the site on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided in *Appendix 4*).

3.4.6 Land disposal units that have filed a closure notification under Subtitle C of RCRA and to which closure requirements have been specified in a closure plan or permit.

RCRA hazardous waste landfills that have submitted closure notifications, as required under 40 CFR 264.112(d) or 265.112(d), generally will not be funded. This may include permitted facilities that have filed notification of closure and for which EPA and/or an authorized state is proceeding with final closure requirements for the facility. For interim status facilities, this is done through approval of a closure plan submitted with closure notification; for permitted facilities, this is routinely done as a modification to the permit, requested by the facility at the time of closure notification.

Please note that RCRA hazardous waste landfills that have submitted closure notifications may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development or the preservation of green space. EPA will consider providing funding to an eligible entity for assessment or cleanup activities at the site on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided in *Appendix 4*).

3.4.7 Facilities that are subject to the jurisdiction, custody, or control of the United States government.

Facilities owned by, or under the custody or control of the federal government are not eligible for brownfields funding, even on a property-specific basis. EPA's preliminary view is that this exclusion may not extend to:

- a. Privately-owned, Formerly Used Defense Sites (FUDS);
- b. Privately-owned, Formerly Utilized Sites Remedial Action Program (FUSRAP) properties; and
- c. Other former federal properties that have been disposed of by the U.S. government.

Also note that land held in trust by the United States government for an Indian tribe is not excluded from funding eligibility.

Also note that eligibility for brownfields funding does not alter a private owner's ability to cost recover from the federal government in cases where the previous federal government owner remains liable for environmental damages.

3.4.8 Sites Contaminated with PCBs

The Brownfields Law excludes from funding eligibility portions of facilities where there has been a release of PCBs that are subject to remediation under TSCA.

EPA's preliminary view is that all portions of properties *are eligible* for brownfields site assessment grants, except where EPA has initiated an involuntary action with any person to address PCB contamination. Also, it is our preliminary view that all portions of properties *are eligible* for cleanup and RLF grants, except where EPA has an ongoing action against a disposer to address PCB contamination.

Therefore, portions of properties that are excluded from funding eligibility include those portions of properties where:

- There is a release (or disposal) of any waste meeting the definition of "PCB remediation waste" at 40 CFR 761.3; *and*
- At which EPA has initiated an involuntary action with any person to address the PCB contamination. Such involuntary actions could include:
 - Enforcement action for illegal disposal;
 - Regional Administrator's order to characterize or remediate a spill or old disposal (40 CFR 761.50(b)(3));
 - Penalty for violation of TSCA remediation requirements;
 - Superfund removal action; or
 - Remediation required under RCRA §3004(u) or §3004(v).

PCBs may be remediated under any one of the following provisions under TSCA:

- a. Section 761.50(b)(3), the directed characterization, remediation, or disposal action.
- b. Section 761.61(a), the self-implementing provision.
- c. An approval issued under §761.61(c), the risk-based provision.
- d. Section 761.61(b) to the level of PCB quantification (i.e., 1 ppm in soil).
- e. An approval issued under §761.77, the coordinated approval provision.
- f. Section 761.79, the decontamination provision.
- g. An existing EPA PCB Spill Cleanup Policy.
- h. Any future policy or guidance addressing PCB spill clean up or remediation specifically addressing the remediation of PCBs at brownfield sites.

Note that any portion of a property where EPA has initiated an involuntary action with any person to address PCB contamination and portions of properties where EPA has an ongoing action against a disposer to address PCB contamination may be eligible for brownfields funding if a grant or loan applicant can demonstrate that brownfields funding will ensure protection of human health and the environment and promote economic development or the preservation of green space. EPA will consider providing funding to an eligible entity for assessment or cleanup activities at the site on a property-specific basis (see guidance on documenting eligibility for property-specific funding determinations provided in *Appendix 4*).

3.4.9 Exclusion of LUST Trust Fund Sites

The Brownfields Law excludes from eligibility for funding (unless EPA makes a property-specific determination for funding) those sites (or portions of properties) for which assistance for response activity has been obtained under Subtitle I of RCRA from the LUST trust fund. EPA's preliminary view is that this provision may exclude:

- a. UST sites where money is being spent on actual assessment and/or clean up of UST/petroleum contamination.

However, in cases where an UST site is located in a state where the state agency has used LUST trust fund money for state program oversight activities but has not expended LUST trust funds for specific assessment and/or cleanup activities at the site, the site would not necessarily be excluded from eligibility for brownfields funding.

Such sites may receive brownfields funding on a property-specific basis, if it is determined that brownfields funding will protect human health and the environment and the funding will promote economic development or enable the creation of, preservation of, or addition to greenspace (see guidance on documenting eligibility for property-specific funding determinations provided in *Appendix 4*).

Examples of “excluded” sites (i.e., sites receiving LUST trust fund monies) we would consider to be good candidates to receive brownfields grants or loans:

- a. All USTfields pilots (50 pilots)
- b. Sites (or portions of properties) where an assessment was completed using LUST trust fund monies and the state has determined that the site is a low-priority UST site and therefore additional LUST trust fund money cannot be provided for the clean up of petroleum contamination, but the site still needs some clean up and otherwise is a good candidate for economic revitalization.
- c. Sites (or portions of properties) where LUST trust fund money was spent for emergency activities, but then the site was determined to be ineligible for further expenditures of LUST trust funds, yet the site needs additional funding for continued assessment and/or clean up that will contribute to economic revitalization of the site.

Appendix 4. Guidance for Requests for Property-Specific Determinations for Funding

Contents	Page
4.1 Overview	2
4.2 Funding Limitations	2
4.3 Criteria for Determining Eligibility for Funding on a Property-Specific Basis	4
4.3.1 Protection of Human Health and the Environment	5
4.3.2 Promote Economic Development	5
4.3.3 Creation of, Preservation of, or Addition to Parks, Greenways, Undeveloped Property, other Recreational Property, or Other Property Used for Nonprofit Purposes	6
4.3.4 Other Documentation	7
4.4 Properties Not Eligible for Brownfields Funding	7
4.5 Additional Information on Potential for Continual Funding at Sites Subject to Removal Actions	8
4.6 Additional Information on Potential Funding for Petroleum-contaminated Sites	8
4.7 Eligible Response Sites/Enforcement Limits	9

4.1 Overview

Grant applicants must determine if any of the properties, or facilities, included in their proposal require a property-specific determination. A list of the categories of facilities that are only eligible for funding via a property-specific determination is provided below.

If an applicant includes within the scope of a grant proposal a facility that requires a property-specific funding determination, the proposal must include, on a separate page, the following information (to the extent this information replicates information requested elsewhere in the proposal, the applicant may directly copy the text to this page):

1. Basic site identification information and eligible entity identification information.
2. The specific circumstance that requires the grantee to request a property-specific determination (from the list in Section 3.4 of Appendix 3).
3. A short explanation of why the site falls within the identified circumstance requiring the property-specific funding determination.
4. An explanation of how providing brownfields funding for the site will meet the criteria necessary for making a property-specific funding determination Section 4.3.
5. The degree to which other funding is or is not available for the assessment or clean up of the site.
6. A explanation of whether or not the applicant is responsible for the contamination at a site.

The information provided will be used in making a property-specific determination for funding purposes, which will take place during the proposal evaluation process.

4.2 Funding Limitations

Although the statutory definition of “brownfield site” is broad, Congress limited the extent to which brownfields funding may be provided to eligible entities to assess and clean up sites that are being addressed under other federal programs. In addition, the Brownfields Law prohibits the use of grant and loan funds for the payment of response costs at sites for which the funding recipient of the grant or loan is potentially liable under §107 of CERCLA⁶. (See Appendix 2 for additional prohibitions on the use of brownfields funding.)

The types of properties that Congress *excluded from* the definition of a brownfield site are listed below. However, certain types of properties listed below as excluded from the definition of a brownfield site, may still qualify for brownfields funding. The types of properties marked with

⁶Applicants also should note that the Brownfields Law contains other prohibitions on the use of grant and loan monies, including the use of grant and loan monies for paying penalties, administrative costs, federal cost-share requirements, and the cost of complying with any federal law (see §101(k)(4)(B)).

an ***asterisk (*)*** below are eligible for brownfields funding if a property-specific determination is made that funding for assessment or cleanup activities will meet the criteria set forth in the statute and meet the goals and criteria of the brownfields program.

- Properties subject to planned or ongoing removal actions under CERCLA.*
- Properties currently listed, or proposed to be listed, on the NPL.
- Properties that include facilities subject to a unilateral administrative order, a court order, an administrative order on consent, or a judicial consent decree under CERCLA.
- Properties with facilities that have been issued or entered into a unilateral administrative order, a court order, an administrative order on consent, or judicial consent decree or to which a permit has been issued by the U.S. or an authorized state under RCRA, FWPCA, TSCA, or SDWA.*
- Properties with facilities subject to RCRA corrective action (§3004(u) or §3008(h)) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures.*
- Properties that are land disposal units that have submitted a RCRA closure notification or that are subject to closure requirements specified in a closure plan or permit.*
- Properties that are subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the U.S., except for land held in trust for an Indian tribe.
- Properties where there has been a release of PCBs and all or part of the property is subject to TSCA remediation.*
- Properties that include facilities receiving monies for clean up from the LUST trust fund.*

** Sites eligible for property-specific funding determinations.*

The types of facilities marked with an asterisk above may qualify for brownfields funding if EPA makes a property-specific determination that brownfields funding will protect human health and the environment **and** will either promote economic development or the creation, preservation, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes. A determination of eligibility for funding will be made by EPA at the time of proposal evaluation based upon information provided by the applicant.

Grant applicants must determine whether the property or properties that are the subject of their proposal fall within the scope of one or more of the exclusions listed above. Actual determinations of eligibility or exclusion will be made by EPA. However, if one or more properties that are the subject of a grant proposal fall within the scope of any of the types of properties listed above, the grant proposal should specifically identify the properties, identify the applicable funding exclusion from the list above, and describe why each property falls within the exclusion (e.g., RCRA permit for hazardous waste storage, CERCLA removal action on-going.) Descriptions summarizing the scope of each of the exclusions listed above are provided in *Appendix 3* of these guidelines.

4.3 Criteria for Determining Eligibility for Funding on a Property-Specific Basis

Certain properties that are excluded from funding eligibility because the properties fall within the scope of the statutory exclusions from the definition of “brownfield site” may qualify for brownfields funding if a property-specific determination is made that the sites meet the goals and criteria of the brownfields program and the criteria set forth in the statute. The following types of properties, although excluded from the definition of brownfield site above, are *eligible for property-specific determinations for brownfields funding*:

1. Properties subject to planned or ongoing removal action under CERCLA.
2. Properties that include facilities to which a permit has been issued by the U.S. or authorized state under RCRA, FWPCA, TSCA, or SDWA.
3. Properties that include facilities subject to RCRA orders requiring corrective action (§3004(u) or §3008(h)).
4. Properties that are land disposal units that have submitted a RCRA closure notification or that are subject to closure requirements specified in a closure plan or permit.
5. Properties where there has been a release of PCBs and all or part of the property is subject to TSCA remediation.
6. Properties receiving monies for clean up from the LUST trust fund.

In the case of each type of property listed above, the new legislation allows EPA to award financial assistance to an eligible entity for assessment or cleanup activities at the property, if it is found that financial assistance will:

1. Protect human health and the environment, ***and***
2. Either:
 - promote economic development, or

- enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

Grant proposals for brownfields funding that include, within the scope of planned assessment or cleanup activities, sites, properties, or facilities that potentially fall within any of the funding exclusions listed above, should specifically identify such circumstances and explain, in as much detail as possible, why the availability of brownfields funding will protect human health and the environment and promote economic development or the creation or preservation of greenspace (or other listed objectives). Information provided by the applicant in addressing these criteria will be used in documenting EPA's decision in making property-specific determinations for funding eligibility.

4.3.1 Protection of Human Health and the Environment

Grant applicants must provide a detailed discussion of how financial assistance for brownfields assessment or cleanup activities at each property for which a property-specific determination for funding eligibility must be made will result in the allocation of funding in accordance with legislative intent. Each proposal for financial assistance, including a recipient of a revolving loan fund grant seeking EPA approval of loans, whose proposal includes one or more sites for which a property-specific determination must be made must include a discussion of how brownfields funding will ensure protection of human health and the environment. Documentation supporting a determination that brownfields funding will ensure protection of human health and the environment should include documentation of one or more of the following:

- Specific examples of human health risks that will be mitigated by activities funded under a brownfields grant.
- Specific environmental improvements that can reasonably be expected to result from activities funded under a brownfields grant.
- Specific examples of contamination that will be addressed, including the specific hazardous substances, pollutants, or contaminants of concern and the environmental media that will be addressed.
- Description of how the proposed clean up and redevelopment of the property will ensure that the property will be protective of human health and the environment and that the remedy will be both protective and consistent with the planned reuse of the property.

4.3.2 Promote Economic Development

Applicants also must provide detail on how financial assistance will promote economic development or the creation of, preservation of, or addition to parks, greenways, undeveloped

property, other recreational property, or other property used for nonprofit purposes. Documentation of economic development activities should include information such as the following:

- A description of economic development activities that can reasonably be expected to occur as a result of brownfields funding (e.g., number of jobs created, estimated increase in the property and/or profits/sales tax base to community, additional business expansion or new business relocation that may occur within the community).
- A description of how the redevelopment of the brownfields property will contribute to community-wide redevelopment and revitalization plans with a specific emphasis on how funding for the brownfields redevelopment is integral to the success of the community-wide plan.
- A description of new businesses or business expansions that are planned for the brownfields property.

4.3.3 Creation of, Preservation of, or Addition to Parks, Greenways, Undeveloped Property, other Recreational Property, or Other Property Used for Nonprofit Purposes

If brownfields funding will be used by the applicant to preserve or create greenspace, recreational areas, undeveloped property, or property to be used for nonprofit purposes, the applicant should provide specific documentation of these activities in the proposal. Grant proposals should provide specific information documenting how brownfields funding will result in the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes, such as:

- A description of the proposed park, recreational property, greenspace, undeveloped space, or other type of property to be used for nonprofit purposes, including size, use, and surrounding environment that will be preserved or created as a result of brownfields funding.
- A description of how the property will be used and by whom.
- A description of how the property will be integrated with surrounding properties or environments.
- A description of how the property will be maintained or preserved for its continued use as a greenspace, recreational area, etc.

When documenting compliance with these criteria, applicants may copy information provided elsewhere in their proposal, if such information directly addresses the criteria. However, all documentation must be comprehensive and specific to actual events that will be mitigated or can

reasonably be expected to occur as a result of federal brownfields funding, should the applicant receive brownfields funding.

4.3.4 Other Documentation

Property-specific brownfields funding determinations will be made based upon the availability of funding and the extent to which applicants can provide documentation that funding for particular sites offers opportunities to protect human health and the environment and enhance economic development or create or preserve greenspace (as the criteria is described above). However, at the same time, Congress explicitly prohibited the use of federal brownfields funding to reimburse liable parties for response costs. The statute prohibits grant and loan monies from being used for the payment of response costs at brownfields for which the recipient of a grant or loan is potentially liable (§101(k)(4)(B)(i)(IV)). Applicants are encouraged to address, in the body of the proposal, why federal funding is appropriate for brownfields assessment and/or clean up at the property, given that brownfields funding cannot be used to reimburse liable property owners for response activity costs.

4.4 Properties Not Eligible for Brownfields Funding

Grant applicants must keep in mind that the legislation *excludes certain types of properties from qualifying for the property-specific* funding determinations and therefore from federal brownfields financial assistance. Properties that *may not* be included within the scope of a grant proposal and for which brownfields grants and loans cannot be made available *regardless of property-specific circumstances* include properties containing the following types of sites or facilities:

- Facilities listed or proposed for listing on the NPL.
- Facilities subject to a unilateral administrative order, an administrative order, a court order, an administrative order on consent, or a judicial consent decree issued or entered into by parties under CERCLA.
- Facilities that are subject to the jurisdiction, custody, or control of the United States government, except for land held in trust by the U.S. for an Indian Tribe.

Applicants should note that the discussion of property-specific determinations for funding properties that are otherwise excluded from funding eligibility that is provided here only applies to funding determinations. This discussion does not apply to, or have bearing on, any other property-specific determinations or other aspects of the brownfields program. For example, a property-specific determination for funding purposes in no way affects a facility's or an entity's status with regard to EPA's enforcement and cost recovery authorities.

4.5 Additional Information on Potential for Continual Funding at Sites Subject to Removal Actions

Some brownfield sites that receive federal brownfields assessment grants may, as a result of the federally funded site assessment require a CERCLA removal action. Under the Brownfields Law (§101(39)(B)(i)), properties that are subject to planned or on-going removal actions under CERCLA are excluded from funding eligibility. However, such properties may receive federal brownfields funding if a property-specific determination is made that such funding will meet the property-specific determination criteria. Applicants should follow the procedures listed in the previous section to request a property-specific determination. (Note: If a removal action is required at a property where an assessment grant exists, the grantee does not need to obtain the property-specific determination noted above. However, grant recipients must obtain approval from the EPA removal OSC prior to any onsite work commencing.)

Grant applicants requesting federal brownfields funding and recipients of revolving loan fund grants seeking EPA approval of loans for properties at which a CERCLA removal action is planned or on-going must document in their proposals (or loan approval requests) that the requested funding will be used in accordance with legislative intent. Therefore, proposals must include a discussion of how brownfields grant or loan funds will ensure protection of human health and the environment and provide detail on how financial assistance will promote economic development or the creation of, preservation or, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes. Requests for property-specific determinations for funding for the assessment or clean up of properties where there is a planned or ongoing removal action will be considered in the following circumstances: 1) when it is clear a follow-on response action will be required to address long-term threats at a property; and 2) in cases where portions of a property are not under the current scope of a planned or ongoing removal action.

In addition to the specific criteria listed above, applicants also should explain in their proposal the extent to which other funding sources are not available for the assessment and/or clean up of the site or property. Federal brownfields funding cannot be used to reimburse liable parties for response costs. In addition, federal brownfields funding may not be used for an ensuing removal action. Applicants should specifically address, in the body of the proposal, why federal funding is appropriate for brownfields assessment and/or clean up at the property, given the Congressional intent not to reimburse liable property owners for response activity costs.

4.6 Additional Information on Potential Funding for Petroleum-contaminated Sites

As noted above, portions of properties receiving assistance for response activities from the LUST trust fund are excluded from eligibility for brownfields funding. However, these facilities are eligible for funding on a property-specific basis. To assist applicants in determining whether their properties are good candidates for property-specific funding determinations, below are examples of properties that are excluded from the definition of a brownfield site (i.e., sites

receiving LUST trust fund monies) that EPA considers to be potentially good candidates to receive brownfields grants or loans under the property-specific determination provisions (i.e., CERCLA §101(39)(C)).

- All USTfields pilots.
- Sites (or portions of properties) where an assessment was completed using LUST trust fund monies and the state has determined that the site is a low-priority UST site and therefore additional LUST trust fund money cannot be provided for the clean up of petroleum contamination, but the site still needs some clean up and otherwise is a good candidate for economic revitalization.
- Sites (or portions of properties) where LUST trust fund money was spent for emergency activities, and are otherwise determined to be ineligible for further LUST trust funds, yet the site needs additional funding for continued assessment and/or clean up that will contribute to economic revitalization of the site.

4.7 Eligible Response Sites/Enforcement Limits

The Brownfields Law limits EPA's enforcement and cost recovery authorities at "eligible response sites" where a response action is conducted in compliance with a state response program. Section 101(40) of CERCLA defines an "eligible response site" by referencing the general definition of a "brownfield site" in §101(39)(A) and incorporating the exclusions at §101(39)(B). The law places further limitations on the types of properties included within the definition of an eligible response site, but grants EPA the authority to include within the definition of eligible response site, and on a property-specific basis, some properties that are otherwise excluded from the definition. Such property-specific determinations must be based upon a finding that limits on enforcement will be appropriate, after consultation with state authorities, and will protect human health and the environment and promote economic development or facilitate the creation of, preservation, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes. While the criteria appear similar to those for determining eligibility for funding on a property-specific basis, the determinations are distinct, will be made through a separate process, and may not be based on the same information requested in this document for property-specific funding determinations.